

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 345 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS and  
MR.JUSTICE A.M.KAPADIA

=====

1. Whether Reporters of Local Papers may be allowed  
to see the judgements? No.

J

2. To be referred to the Reporter or not? No.

3. Whether Their Lordships wish to see the fair copy  
of the judgement? No.

4. Whether this case involves a substantial question  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?  
No.

5. Whether it is to be circulated to the Civil Judge?  
No.

-----  
STATE OF GUJ.

Versus

RAMKARAN CHHATRASINH MINAMARVARI

-----  
Appearance:

Mr. M.A.Bukhari, Addl. Public Prosecutor for the  
appellant.

Mr. Maganbhai Barot, Senior Advocate with Krishna  
V.Barot for respondents Nos. 2 nad 4.

Respondents Nos.1,3 and 5 served.  
-----

CORAM : MR.JUSTICE K.R.VYAS and  
MR.JUSTICE A.M.KAPADIA  
Date of decision: 15/02/99

ORAL JUDGEMENT

PER: K.R.VYAS,J

The State of Gujarat has preferred this appeal challenging the judgment and order of acquittal passed by the learned Sessions Judge, Vadodara in Sessions Case No. 73/89 acquitting all the respondent-accused of the alleged offence punishable under Section 17 of the Narcotic Drugs and Psychotropic Substances Act.

The prosecution case, in brief, can be summarised as under : P.S.I. Jayantibhai Vasava (PW 9, Ex.39) of Jawaharnagar Police Station received an information on the night of 3rd/4th November, 1988 from Head Constable Pratapsinh that he has received an information from his informant that some persons are coming with opium and are to enter Township near Kaveri Hotel. On receipt of the said information, the complainant Jayantibhai Vasava immediately informed his superior officer on telephone. On receipt of the said information DCP Gehlot, SP Atit, PSI Rathod, HC Salamsinh, HC Pratapsinh and PC Pushpendra started in a jeep and came to PT Chowki. The complainant thereafter called two Panchas viz Gopal Shah (PW 4, Ex.24) and Vijaysinh Chauhan (PW 3,Ex.17) who were informed about the information received by the police . All the members of the raiding party then took their position opposite Kaveri Hotel and waited for the persons to come. Soon thereafter one scooter bearing No. 531 and a rickshaw bearing No. 8548 came there. On intensive search of the dicky of rickshaw a packet containing 3 kgs of opium and from the dicky of scooter some quantity of opium was found. Accused Nos.2,3 and 4 were in the rickshaw whereas accused No.1 was on the scooter. Two samples, each of 50 grams, from the packet of opium found from the dicky of rickshaw and the quantity of opium found from the dicky of the scooter were taken after preparing a panchnama and they were sealed and slips containing the signatures of the Panchas were pasted thereon . The rest of the opium was also sealed and slip was pasted thereon. A panchnama was also drawn and the seal of Jawaharnagar Police Station were placed on the said samples and the remaining quantity of opium. Statements of the accused were recorded.

It appears that the said rickshaw was hired by

accused No.3 on 22nd November, 1988 and on the day of the incident it was driven by accused No.2. On interrogation of accused No.1 it was revealed that he had delivered some quantity of opium to certain persons and therefore SP Atit deputed PSI Rathod (PW 5, Ex.23) to investigate into the said information. PSI Rathod went to the house of accused No.5 with the Panchas and on search of the house of accused No.5, 700 grams of opium was seized under a Panchnama out of which sample was also taken. The muddamal samples were thereafter sent through PC Suman Chaudhari (Pw 7, Ex.35) to Forensic Scientific Laboratory, Surat, for examination and on receipt of the said FSL report which revealed that the samples were of opium, a chargesheet was filed against all the accused before the learned Judicial Magistrate, First Class, Vadodara. The said case was thereafter committed to the Court of Session.

Charge Ex.6, was framed against the accused to which the accused pleaded not guilty and claimed to be tried. The learned Sessions Judge, Vadodara, who tried the accused, after considering the evidence on record, including the statements of the accused recorded under Section 313 of the Criminal Procedure Code, came to the conclusion that the prosecution has failed to prove the charge against the accused and, therefore, vide his order dated 20-2-91 acquitted all the respondent-accused.

After having invited our attention to the evidence of the prosecution witnesses, Mr.Bukhari, learned Additional Public Prosecutor, submitted that the learned Sessions Judge has not properly appreciated the evidence of the complainant and other prosecution witnesses. Mr.Bukhari submitted that since a huge quantity of opium was recovered from the possession of the accused, it is not possible for the police to plant the same in the midst of a public road and the prosecution has successfully brought home the guilt of the accused. He, therefore, submitted that the appeal is required to be allowed

On the other hand, Mr. Maganbhai Barot, learned Senior Advocate, appearing for the respondents supported the reasoning of the learned Sessions Judge in toto.

Now, as far as the present case is concerned, none out of the four Panch witnesses examined by the prosecution, has supported the prosecution case. Thus, there is no corroboration to the evidence of the complainant PSI Vasava. Even though PSI Vasava gave

prior information about the information he had received to SP and DCP on telephone and pursuant to the said information those officers came and were waiting for the arrival of the vehicles at Kaveri Hotel, meaning thereby they were present at the time of the raid, they have not been named as witnesses in the chargesheet. Thus, the evidence of PSI Vasava is not corroborated on material aspects. Thus, we have to consider the evidence of the complainant Vasava as well as other constables who were examined in the case. Since complainant Vasava has narrated the facts stated by us in the foregoing paragraphs of this judgment, it is not necessary for us to re-narrate his evidence. Reading the evidence of the complainant, it is clear that accused No.1 was on the scooter while accused Nos.2,3 and 4 were in the rickshaw. According to PSI Vasava, accused No.2 was driving the rickshaw and the opium was seized from the rickshaw as well as scooter on the night of 3rd and 4th November, 1988. Vijaysinh Chauhan (PW 3, Ex.17) has been examined by the prosecution as a Panch witness to corroborate the say of the complainant. We have seen the letter, Ex.36, written to Forensic Scientific Laboratory by PSI Jawaharnagar Police Station, as well as the complaint, Ex.49, wherein it is mentioned that the muddamal articles were seized on 3rd November, 1988. In the complaint figure "3" is overwritten and made it as "4". After pointing out this discrepancy, it was submitted by Mr. Barot that the opium was already in possession of the PSI and he has made out a false case against the accused. Reading the evidence of PSI Vasava, it is clear that the raid was carried out on 3rd November, 1988. As per letter, Ex.18, addressed to Forensic Scientific Laboratory by Jawaharnagar Police Station, it is clear that the muddamal articles were seized on 3rd November, 1988. Panch Vijaysinh Chauhan (PW 3) was unable to identify the accused before the Court. It is his say that on 4th November, 1988 he was called at PT Township Police Chowky. He was unable to give the side from which the scooter came. According to him two persons were sitting on the scooter, which is quite contrary to the evidence of the complainant Vasava. Panch Vijaysinh is unable to identify these two persons. There is also a contradiction regarding the recovery of the opium. It is the say of the complainant as well as Panch Vijaysinh that the opium was recovered from the dicky of the scooter. However, the major contradiction is to the effect that the Panch Vijaysinh has stated that the sample was taken from one pocket and was kept in a bottle and the said bottle was sealed, whereas it is the case of complainant Vasava that the sample was packed in a blue plastic paper and packed in a small packet. In view

of the fact that the complainant and the Panch have given contradictory versions with regard to the person sitting on the scooter and the manner in which the opium was recovered from the dicky of the scooter, as the Panch witness has stated that the dicky was got opened by a key and the police seized that key whereas it is not the case of the complainant and there is no mention about the key in the Panchnama, the learned Sessions Judge, considering the evidence of the complainant Vasava as well as Panch Vijaysinh, has in our opinion rightly recorded a finding that from their evidence it becomes difficult to say as to who was in conscious possession of the opium. According to the learned Sessions Judge the authorship of the scooter is also not proved on the record. On the contrary it is proved on the record that accused No.1 is not the owner of the said scooter. Merely because the opium was there in the dicky of the scooter, that does not make accused No.1 liable. In view of the contradictory versions of the complainant who has stated that accused No.1 was on the scooter, and of the Panch witness Vijaysinh, who has stated that two persons were on the scooter, it is observed by the learned Sessions Judge that the Panch witness is unable to identify as to who were the persons who were travelling on the scooter. We are in agreement with the said finding. As stated above, there is material discrepancy with regard to the seizure of the muddamal article from the possession of accused No.1, whether it was on 3rd or 4th November in view of the overwriting of figure "3" in the complaint and making it to figure "4", in our opinion, this is a material contradiction and when one of the Panchas has turned hostile to the prosecution, it is not safe to accept the evidence of the complainant Vasava without there being any corroboration.

There is not only contradiction with regard to the recovery of the muddamal from the dicky of the scooter but even the preparation of the Panchnama, whether it was prepared at the place of the seizure or at the police chowky. Similarly there is discrepancy, as noted above, with regard to the opening of the dicky with the help of key. Unfortunately no reference is made about the key in the Panchnama. Thus, in absence of consistent evidence on this material aspect, it is not possible for us to conclude that the prosecution has proved the case against accused No.1 regarding the conscious possession of the muddamal opium. The learned Sessions Judge with regard to this aspect has also observed that it may be that accused No.1 might be driving the said scooter and another person might be sitting on the back seat of the scooter in possession of

the said opium or the owner of the scooter might have placed the opium in the dicky of the scooter. Therefore, when there are several possibilities, it becomes difficult to record an order of conviction as far as accused No.1 is concerned. Suffice it to say that we agree with the findings recorded by the learned Sessions Judge.

As far as accused Nos.2,3 and 4 are concerned, as per the evidence of PSI Vasava, they were travelling in the rickshaw. It is also clear that the rickshaw belonged to one Yakubhai (PW 8, Ex.37) which was hired by accused No.3. It is not in dispute that from the dicky of the rickshaw the said muddamal was recovered. It is the say of Panch Vijaybhai (Ex.17) that from the rickshaw dicky one packet of opium was found. Panch was unable to identify as to who were the persons who were sitting in the said rickshaw. Similarly the Panch has also not identified in the Court that the accused were the persons who were sitting in the rickshaw. The Panch was also unable to say as to which packet was found out from the rickshaw and which packet was found out from the scooter. It has also come in the evidence that at the time of the raid, accused No.2 was driving the rickshaw hired by accused No.3. In view of these facts, as far as the question of conscious possession of the opium is concerned, it is difficult for us to pin point any of the accused who were there in the rickshaw. Since the opium in question was found from the dicky of the rickshaw, it may be either accused No.2, who was driving the rickshaw or accused No.3 who had hired the rickshaw or even Yakubhai the owner of the rickshaw. Panch witness Gopalbhai (PW 4) examined by the prosecution has not supported the prosecution case regarding recovery of opium from the dicky of the rickshaw and he has been declared hostile to the prosecution. In our opinion, the prosecution has failed to prove the conscious possession of the opium so far as accused Nos.2,3 and 4 are concerned. These accused who were sitting in the rickshaw had no access to the dicky. In view of the evidence on record that the driver of the rickshaw was not driving the rickshaw and that the owner of the rickshaw had not cared to inquire about the rickshaw, merely because the three accused persons were travelling in the said rickshaw, they cannot be held liable since interse connection is between the accused Nos.2,3 and 4 to the effect that accused No.2 was knowing accused Nos.3 and 4 and that they had entered into a deal to supply opium. In absence of such evidence, the learned Sessions Judge has also observed that it cannot be ruled out that the owner of the rickshaew might have put the opium

packet in the dicky. So the place from where the opium was seized was such that it is difficult to come say as to who was in possession of the opium. We also share our views with the learned Sessions Judge as far as this finding is concerned.

Then comes the seizure of the opium from the house of accused No.5. Since Panch Mehmood Shaikh has not supported the prosecution, the prosecution has examined Manekbhai Marathi the co-Panch at Ex.16. He has also not supported the prosecution. Thus the Panchas have not supported the seizure of the opium from the house of accused No.5.

The prosecution has led no evidence to show as to who was the occupier of the house on the day of the seizure of the opium or that who was in possession of the said house. Mr. Barot, learned Senior Advocate criticised the investigation carried out by PSI Rathod who was entrusted the said duty by Vasava. We quite see the point raised by Mr. Barot. In our opinion the complainant Vasava was not competent to delegate his power to PSI Rathod. There was no valid authorisation to search the premises of accused No.5. As regards the find of the tin box from the house of accused No.5, the learned Sessions Judge, after considering the evidence on record, has observed that the prosecution has miserably failed to prove as to whom that tin-box belonged, who was in possession of the said room and whether accused No.5 was the occupier or the owner of the said house. After going through the evidence on record, we are also of the same view and in our opinion the said finding recorded by the learned Sessions Judge is unassailable. In that view of the matter, we are of the opinion that the prosecution has failed to prove that all the accused were in conscious possession of the opium in question and, therefore, the learned Sessions Judge was perfectly justified in passing the order of acquittal. Since we are in total agreement with the reasoning of the learned Sessions Judge it is not possible for us to reverse the impugned judgment and order of acquittal and to convict the accused of the offence charged with. There being no substance in this appeal, it fails.

In the result, the appeal is dismissed. Bail bonds stand cancelled.

\*\*\*\*\*

8 Verified copy